

FEDERAL CIRCUIT COURT OF AUSTRALIA

*PONGCHOMPOO & ORS v MINISTER FOR
IMMIGRATION & ANOR*

[2020] FCCA 3256

Catchwords:

MIGRATION – Partner visa – ‘spouse’ – whether failure to consider evidence – ‘pooling of financial resources’ – whether Tribunal identified wrong issue or asked itself wrong question – no error demonstrated – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5F, 5F(2) & 5CB

Migration Regulations 1994 (Cth), rr.1.15A, 1.15A(2), 1.15A(3), cl 801.221(1) & 801.221(2)(c)

Cases cited:

He v Minister for Immigration & Border Protection [2017] 255 FCR 41

Nguyen v Minister for Home Affairs [2019] FCA 892

Pelka v Secretary, Department of Family & Community Services (2006) 151 FCR 546

Huai Xin Li v Minister for Immigration & Citizenship (2008) 102 ALD 354

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259

Singh v Minister for Immigration and Border Protection (2017) 159 ALD 442

First Applicant:	SURIYA PONGCHOMPOO
Second Applicant:	SOPANUT PONGCHOMPOO
Third Applicant:	CHUTIMON PONGCHOMPOO
First Respondent:	MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES & MULTICULTURAL AFFAIRS
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	ADG 236 of 2019
Judgment of:	Judge Heffernan

Hearing date: 23 October 2020
Date of Last Submission: 23 October 2020
Delivered at: Adelaide
Delivered on: 4 December 2020

REPRESENTATION

Counsel for the Applicant: Ms Heuzenroeder
Solicitors for the Applicant: Camatta Lempens Pty Ltd
Counsel for the Respondents: Mr Retallick
Solicitors for the Respondents: Australian Government Solicitors

ORDERS

- (1) The application is dismissed.
- (2) The applicants to pay the costs of the first respondent fixed in the amount of (SIX THOUSAND DOLLARS) \$6,000.
- (i)
- (3)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT ADELAIDE

ADG 236 of 2019

SURIYA PONGCHOMPOO

First Applicant

SOPANUT PONGCHOMPOO

Second Applicant

CHUTIMON PONGCHOMPOO

Third Applicant

And

**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT
SERVICES & MULTICULTURAL AFFAIRS**

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. This is an application for judicial review of a decision of the Administrative Appeals Tribunal ('the Tribunal') dated 30 May 2019. That decision affirmed an earlier decision of a delegate of the first respondent refusing to grant the first applicant's Partner (Residence) (Class BS) (subclass 801) visa ('the visa').

2. The application proceeded by way of the Amended Application filed on 22 November 2018. The grounds of application are as follows:

‘1. The Tribunal’s decision was affected by jurisdictional error in that it failed to properly consider the evidence of the applicant and sponsor’s pooling of financial resources when deciding if the requirements of s SF of the Migration Act 1958 were met.

Particulars

- 1.1 The Tribunal was required to consider all of the circumstances of the relationship, including the matters contained within reg 1.15A of the Migration Regulations 1994, when determining if the applicant and sponsor were in a married relationship;*
- 1.2 Sub clause (3)(a)(iii) of reg 1.15A required the Tribunal to consider ‘the extent of any pooling of financial resources, especially in relation to major financial commitments’;*
- 1.3 The applicant and sponsor gave evidence to the Tribunal that they had each made loans of \$12,682 and \$10,000 respectively to the company Thai Phattara Pty Ltd trading as Thai to You Murray Bridge;*
- 1.4 The Tribunal failed to give proper, genuine and realistic consideration to the evidence of the applicant and sponsor in paragraph 1.3 above;*
- 1.5 The failure of the Tribunal to consider the evidence in paragraph 1.3 above was material, in that, had it considered the evidence, it could realistically have affected the decision.*
- 2. Further and or in the alternative, the Tribunal’s decision was affected in that it misconceived the legal meaning of the phrase “the extent of any pooling of financial resources, especially in relation to major financial commitments” such that it identified a wrong issue, and or asked itself a wrong question and the Tribunal thereby exceeded its authority and fell into jurisdictional error.*

Particulars

- 2.1 *There was uncontradicted evidence before the Tribunal which the Tribunal referred to with apparent acceptance, that both the applicant and his sponsor had made loans (of \$12,682 and \$10,000 respectively) to the company Thai Phattara Pty Ltd trading as Thai to You Murray Bridge;*
- 2.2 *The company was the entity through which the applicant operated a restaurant business for the purpose of their joint relationship, and for their mutual security and benefit.*
- 2.3 *Knowledge about the operation of the company structure resided with the applicant's accountant, such that the applicant understood it to be a trust, implicitly for the benefit of the applicant and the applicant's sponsor, and the sponsor believed that she was a co-owner of the enterprise;*
- 2.4 *The contributions referred to in paragraph 2.1 herein represented very significant amounts of money in the context of the financial resources of the applicant and his sponsor, including that the sponsor funded her contribution towards the pooling by means of accessing her superannuation;*
- 2.5 *Notwithstanding the matters particularised in paragraphs 2.1 to 2.4 herein, the Tribunal failed to address this pooling of financial contributions and directed his attention instead to the absence of pooling in the context of the couple's day to day expenses by reason of the error of law identified above.*
- 2.6 *The error complained of in paragraph 2 above was material, in that had the Tribunal correctly construed the relevant words it could realistically have affected the decision.*
3. *Further and or in the alternative, the Tribunal's decision was affected by a failure to take into account a matter which it was legally required to take into account and its jurisdiction and authority to decide was thereby affected and it fell into jurisdictional error.*

Particulars

- 3.1 *The applicant repeats particulars 2.1 to 2.5 in paragraph 2 herein.*

3.2 *The error complained of in paragraph 3 above was material, in that had the Tribunal properly taken into account the relevant matter it could realistically have affected the decision.'*

Background

3. The first respondent prepared a useful summary of the chronology in this matter which was not the subject of any dispute. I have paraphrased that chronology below.
4. The first applicant ('the applicant') was born in Thailand in 1977. The second and third applicants are his adult children. In February 2013 the applicant lodged an application for a temporary partner visa. He did so on the basis of being in a spousal relationship with a permanent Australian resident, Ms Phompak ('the sponsor'). His adult children were included on that application. He was granted the temporary visa.
5. The applicant lodged an application for the subject visa on 19 February 2016. The application was refused on the basis that the applicant did not satisfy cl 801.221(1) of the *Migration Regulations 1994 (Cth)* ('the Regulations'). The delegate was not satisfied that the applicant was in a genuine and continuing relationship with the sponsor and for that reason was not satisfied that he could be regarded as a spouse or de facto partner of the sponsor as defined in s 5F and s 5CB of the *Migration Act 1958 (Cth)* ('the Act').
6. The applicant sought to review the decision of the delegate within time and all three applicants appeared before the Tribunal on 23 April 2019. The applicant appeared again on 29 April 2019. Both the applicant and his sponsor gave evidence by telephone from Thailand and the second and third applicants gave evidence in person. Other evidence was taken by telephone.
7. On 30 May 2019 the Tribunal affirmed the delegate's decision not to grant the applicants the visas.

Tribunal reasons

8. The issue on review was the same as that which the delegate had found to be determinative, namely, whether the first applicant was the spouse of the sponsor for the purposes of cl 801.221(1).

9. At the outset, the Tribunal looked to the question of whether the first applicant was in a spousal relationship with the sponsor, as defined in s 5F of the Act. It accepted that the parties were validly married to each other for the purposes of the Act.¹ The Tribunal reminded itself that under the definition it was necessary for the first applicant to demonstrate that there was a mutual commitment to a shared life as a married couple to the exclusion of all others; that the relationship must be genuine and continuing; and that the couple must live together or not live separately and apart on a permanent basis. It reminded itself that in forming an opinion about those matters regard had to be had to all of the circumstances of the relationship. It noted that this included evidence of the financial and social aspects, and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r 1.15A(3). The Tribunal noted the decision in *He v Minister for Immigration and Border Protection*² which required it to consider each of the specific matters contained in that regulation as if they were in effect questions which had to be answered. It then went on to consider whether the other requirements for a spousal relationship were met as defined in the Act. In so doing it made the following findings:

- a) About a week after the marriage in 2012, the first applicant moved into the sponsor's house in Bonnyrigg New South Wales, an outer suburb of Sydney.
- b) From about June 2014 to April 2015 the first applicant opened and ran a restaurant somewhere near Mudgee in New South Wales. The sponsor was not involved in running the restaurant. The first applicant lived near the restaurant and visited the sponsor once a week during that time but otherwise the parties lived separately. It rejected evidence of the sponsor to the effect that during this period the first applicant spent 2 to 3 nights per week living with her. The sponsor gave evidence that she believed the restaurant was in Wollongong and the Tribunal found that she was mistaken about the location. It noted that she said she did not ever visit the restaurant because it was too far away. The Tribunal found that there was no evidence that the first

¹ Section 5F(2)(a) of the Act.

² [2017] 255 FCR 41.

applicant had advised the Department of the change in his living arrangements and it was satisfied that he did not do so. The Tribunal found that the parties were living apart during that time.

- c) The applicant moved to Murray Bridge in South Australia in about April 2015 to run a restaurant. That opened towards the end of 2015. The sponsor remained in Bonnyrigg working on a mushroom farm. The first applicant said that the sponsor would move to Murray Bridge if the new restaurant venture proved to be successful.
 - d) In 2016 the first applicant opened a third restaurant in Paralowie, South Australia. That business ran for about 3 to 4 months.
 - e) It was accepted that the first applicant opened a fourth restaurant in Hahndorf, South Australia towards the end of 2016.
 - f) The first applicant and the sponsor travelled to Thailand together in October 2017. The first applicant has been unable to return to Australia because of the conditions of his bridging visa. The Tribunal accepted that the first applicant had been expecting to be able to return to Australia but that he had misunderstood the terms of his bridging visa.
 - g) In August 2018, the first applicant closed the Murray Bridge restaurant. In his absence it had been run by friends from Thailand.
 - h) Whilst the first applicant stated in a statutory declaration that he and the sponsor had purchased a car, he gave contradictory evidence before the Tribunal to the effect that the sponsor had changed her mind and cancelled the purchase.
10. The Tribunal was not satisfied that the evidence demonstrated the parties having a common intention for the sponsor to move to South Australia in the event that the restaurants were successful enough. It found that the restaurants in Murray Bridge and Hahndorf were trading well enough to justify the sponsor moving to South Australia if the parties had held that intention. It concluded that the sponsor preferred to remain working in New South Wales. The Tribunal concluded that it was not satisfied that the applicant and the sponsor were not living

separately and apart on a permanent basis from late 2014 at about the time the applicant had opened his first restaurant.

11. With respect to the r 1.15A(3) factors, the Tribunal made a number of findings. As to the financial aspect of the relationship, the Tribunal found that the parties were not joint owners of real estate or other major assets. It concluded that they were not in a financial position to have accumulated real estate or major assets and so it accorded no weight to that consideration.
12. As far as joint liabilities were concerned, it found that the parties did not claim to have any joint financial liabilities, that the sponsor did not regard her co-ownership of the Hahndorf restaurants to be a likely liability, and that the nature of her interest in that business was not clear. It noted that her name was not on the lease and that her interest may be as a beneficiary under a family trust, meaning that she was not likely to incur any liability.
13. As to the pooling of financial resources, the Tribunal noted the first applicant's evidence that they occasionally provided each other with small amounts of cash on an irregular basis but that both parties claimed that they did not have any major financial commitments. On that basis the Tribunal found that there was a very limited pooling of financial resources at the time of the decision, however given that they were at the time of hearing living in different countries, it gave that consideration little weight.
14. The Tribunal found no evidence of any relevant legal obligations between the parties at the time of the decision and gave that consideration little weight.
15. On the question of sharing day-to-day household expenses, the Tribunal appears to have accepted that the parties shared some day-to-day household expenses when they lived together for about two years from September 2012. It noted that given the first applicant had not been able to return from Thailand it was understandable that there was no more recent evidence of sharing such expenses.
16. When considering the nature of the household, the Tribunal found that there was no evidence of joint responsibility with respect to the first

applicant's children and gave that consideration no weight. It also found that the parties had not lived together other than for a few nights since the first applicant moved to Mudgee in 2014, and that they did not currently share a household and for that reason did not share household tasks. It gave those considerations little weight. It considered whether there were other matters of relevance in this regard, and it took into account that at the time of hearing, the sponsor had travelled to Thailand and that the first applicant and she were living at her parents' house. The Tribunal was not satisfied that such a temporary arrangement suggested the establishment of a household and did not regard it as relevant when considering the nature of the household.

17. With respect to the social aspects of the relationship, the Tribunal accepted the evidence that at the time of the decision the parties presented themselves to other people as being married to each other but it found that because they lived in different countries there was an obvious restriction on the extent to which they did so and that this consideration could be given little weight. It had regard to the fact that the evidence of other witnesses suggested that they believed when the first applicant and spouse were together, they shared a spouse-like relationship. Noting that this was relatively infrequently, the Tribunal accorded that consideration limited weight. The Tribunal appeared to accept that during the sponsor's current trip to Thailand she and the first applicant were generally staying together and planned social activities together. Against that fact, the Tribunal balanced the observation that this was for a limited time period and accorded it little weight.
18. When considering the nature of the person's commitment to each other, the Tribunal noted that the parties had been married for about 6½ years at the time of the decision but balanced against that the fact that they had lived together for only about two years. Whilst it accepted the submission made on behalf of the first applicant that physical separation for work or other reasons did not necessarily mean that the parties had legally separated, the Tribunal relied on its earlier finding that it was not satisfied that the parties actually intended that the sponsor would join the applicant in South Australia if the restaurant business had been successful. It was not satisfied that at the time the

first applicant moved to South Australia the parties were not living separately and apart on a permanent basis. The Tribunal found that the parties were in a relationship for about two years until the first applicant moved to Mudgee. In that context, being only a fraction of the time that they had been married, the Tribunal did not give the two years in which they had lived together much weight. The Tribunal was not persuaded that the companionship and comfort the sponsor have been able to give the first applicant on her recent trip to Thailand accounted for much in the context of the overall chronology of their relationship. Whilst it had regard to the evidence of both the first applicant and the sponsor that they both saw the relationship as a long-term one, the Tribunal was not satisfied that the parties had a mutual commitment to a shared life as a married couple to the exclusion of all others for the purposes of s 5F(2)(b) of the Act. It was not satisfied that the relationship was genuine and continuing for the purposes of s 5F(2)(c) or that the parties were living together³ or that they did not live separately and apart on a permanent basis.⁴ As a result it was not satisfied that the requirements of s 5F(2) were met and accordingly the first applicant could not meet cl 801.221(1).

Legislative framework

19. Part 801 of Schedule 2 to the Regulations set out the criteria for the grant of the visa. Pertinently, cl 801.221(2)(c) provides that it is necessary that ‘the applicant is the spouse or de facto partner of the sponsoring partner’.
20. The definition of spouse is found in s 5F of the Act:

‘Spouse

- (1) *For the purposes of this Act, a person is the spouse of another person (whether of the same sex or a different sex) if, under subsection (2), the 2 persons are in a married relationship.*
- (2) *For the purposes of subsection (1), persons are in a married relationship if:*

³ Section 5F(2)(d)(i).

⁴ Section 5F(2)(d)(ii).

- (a) *they are married to each other under a marriage that is valid for the purposes of this Act; and*
- (b) *they have a mutual commitment to a shared life as a married couple to the exclusion of all others; and*
- (c) *the relationship between them is genuine and continuing; and*
- (d) *they:*
 - (i) *live together; or*
 - (ii) *do not live separately and apart on a permanent basis.*
- (3) *The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provisions in relation to the determination for different purposes whether one or more of those conditions exist.'*

21. Regulation 1.15A has made provision in relation to the determination of whether any of the conditions in s 5F(2) exist. For the purpose of the Regulation, the Minister must consider all of the circumstances of the relationship, including the matters set out in sub-regulation (3). Relevantly for the purposes of this matter, sub-regulation (3) sets out the following matters for mandatory consideration:

- '(a) the financial aspects of the relationship, including;*
 - i. any joint ownership of real estate or other major assets; and*
 - ii. any joint liabilities; and*
 - iii. the extent of any pooling of financial resources, especially in relation to major financial commitments ...'*

Submissions

First Applicant's submissions

Ground one

22. The first applicant submitted that the Tribunal failed to give the required degree of consideration to the matters set out in sub-reg 1.15A(3)(a)(iii) in the sense that it failed to give “*proper, genuine and realistic consideration*”⁵ to the extent of the couple’s pooling of financial resources. For that reason, the Tribunal fell short of engaging in an active intellectual process as required by the regulation. It is established that in order to consider the circumstances in reg 1.15A(3) the Tribunal is required to make findings on each of the prescribed matters numbered in Roman numerals.⁶ It was submitted that in the context of considering r 15A(3)(a)(iii), the Tribunal did not refer to the contribution made by the sponsor to the restaurant business because it concluded that there was very limited evidence of the pooling of financial resources at the time of the decision. It noted that this was not surprising given that they were living in different countries. The first applicant does not complain that no finding was made about pooling but rather, that the reasons demonstrate the Tribunal failing to apply the proper, genuine and realistic consideration to that question required by the authorities. It was submitted that the pooling of the couple’s financial resources at the time the restaurant business commenced, having been done to provide for their joint future, was a highly relevant matter and that a failure to consider it demonstrates a failure to give proper consideration to the question of pooling. The first applicant acknowledged that the Tribunal made references to the wife’s contribution of \$10,000 to the restaurant business but submits that mere mention of those matters did not constitute a proper, genuine and realistic consideration of the implications of that fact. This could be seen to be a failure to deal with evidence that had a bearing on a substantial and clearly articulated argument.⁷ The Tribunal did not appear to have doubted the evidence about the wife’s financial contribution towards the first applicant’s restaurant business and in fact took into account with respect to its separate consideration of reg 1.15A(3)(a)(i). The error lay in the fact that it completely ignored that

⁵ *He v Minister for Immigration and Border Protection* [2017] 255 FCR 41, [52].

⁶ *Ibid* [76].

⁷ *Nguyen v Minister for Home Affairs* [2019] FCA 892.

evidence when considering the question of pooling. In the submission of the first applicant, the Tribunal's reasons amounted to a finding that there was no evidence *of substance* of pooling of financial resources by the first applicant and the sponsor. That was contrary to the clear evidence. The Tribunal failed in its statutory duty to consider r 1.15A(3)(a)(iii).

Ground two

23. By this ground the first applicant contends that the Tribunal applied the wrong legal test or misunderstood the matter referred to in r 1.15A(3)(a)(iii). It was submitted that it approached the question of the extent of any pooling of financial resources in an erroneously narrow way. In support of that submission, counsel for the applicants referred me to the following observations of French J in *Pelka v Secretary, Department of Family & Community Services*:

“A relevant constructional question which arises under the first ground is the meaning of the term ‘pooling of financial resources’ in s 4(3)(a)(ii). The ordinary meaning of the word ‘pool’ in this context is set out in the New Shorter Oxford English Dictionary thus:

Put resources into a common stock or fund; share in common, combine for the common benefit.

This, in my opinion, is the sense in which the noun ‘pooling’ is used in s 4(3)(a)(ii). It plainly involves something more than financial cooperation or separate contributions to different elements of household expense. The so-called ‘barter system’ did not constitute a pooling of financial resources in that sense. If Mr Kuhl paid for or contributed to overseas travel for Ms Pelka instead of paying rent, that is not a ‘pooling of financial resources’ any more than his payment of rent would be so described. There was no evidence of pooling, properly so called, identified by the Tribunal in its findings and the Tribunal’s finding that there was appears to reflect an error of law. That error is a misconstruction of s 4(3)(a)(ii). There was no pooling ‘in relation to major financial commitments’ which is a particular focus of the pooling to be considered under s 4(3)(a)(ii). I accept that there was a very small scale pooling reflected in evidence that Ms Pelka and Mr Kuhl contributed to a collection box funds that were used on overseas trips ...”⁸

⁸ (2006) 151 FCR 546, [52].

24. Counsel for the applicants submitted that in the context of the clear evidence of contributions by both the first applicant and the sponsor to the restaurant business, which was operated to provide for their joint future, the Tribunal must be taken to have adopted an erroneous construction of “*pooling of financial resources*”. In doing so it erred in excluding from its consideration contributions made to the business, which were resources combined for their common benefit. Counsel submitted that in order for this ground to succeed it was not necessary that the Court finds that the Tribunal failed to have any regard to the \$10,000 contribution made by the sponsor to the restaurant business.

Ground three

25. With respect to this ground, the matter or circumstance which the Tribunal was legally required to take into account was the couple’s mutual commitment to the restaurant business consequent upon their binding joint obligations and powers under the trust deed through which the business was operated. Regulation 1.15A(2) required the Minister to “*consider all of the circumstances of the relationship including the matters set out in subregulation (3)*”. Given that subreg (3) is not an exhaustive list of the circumstances which the decision maker is required to consider, the facts of this matter required it to consider the fact that the sponsor had contributed \$10,000 drawn from her superannuation to apply to the restaurant business. That evidence was clearly one of the circumstances of the relationship which the Tribunal was bound to consider. It was submitted that a fair reading of the reasons did not support the Tribunal having given proper genuine and realistic consideration to those circumstances. The applicants conceded that the Tribunal considered the claim that the sponsor wife intended to move to South Australia if the restaurant business was sufficiently successful. However the Tribunal did not make any reference to the first applicant’s contention that the purpose of the restaurant business was to provide for the couples joint future. Nor did it make any reference to the documentary evidence before it in the form of the trust deed which showed that the first applicant and the sponsor were joint beneficiaries and joint principles of that trust. It was submitted that that aspect of the case was not merely a relevant circumstance of the relationship but also relevant to an assessment of the couple’s intentions for the future. It was submitted that those

intentions were relevant to any assessment of the criteria in s 5F(2)(b)-(d) and in particular the requirement that the couple did not live separately and apart on a permanent basis.

First respondent's submissions

26. With respect to ground one, the first respondent submitted that the applicants had overstated the nature of the finding made by the Tribunal with respect to r 1.15A(3)(a)(iii). The reasons of the Tribunal should not be read as a finding that there was “*no evidence of substance*” of pooling of financial resources but rather, as stated in the decision record that “*there is very limited pooling of financial resources at the time of the decision...*”. The two propositions are substantively different. It was submitted that there was no basis for an inference that the evidence of the sponsor’s financial contribution to the restaurant was not given proper genuine and realistic consideration by the Tribunal when considering the pooling issue. The Tribunal had correctly summarised the matters of which it was required to have regard and referred to the sponsor’s financial contribution on a number of occasions in its reasons. Ultimately the weight to be given to the “*limited pooling of financial resources*” was a matter for the Tribunal.
27. As to ground two, the first respondent submitted that this ground was premised on a finding by this Court that the Tribunal did not consider the sponsor’s financial contribution to the restaurant business when making its finding under r 1.15A(3)(a)(iii). It was submitted that such an inference was simply not open on a fair reading of the decision record. Similarly, with respect to ground three, the first respondent contended that the applicants simply could not establish that the Tribunal had failed to take into account any matter which it was required to consider by virtue of the regulations.

Consideration

28. When considering this application it is necessary to keep in mind that the finding of “*very limited pooling*” of financial resources was but one aspect of the findings made by the Tribunal which led it to reach the ultimate conclusion that the sponsor was not the ‘spouse’ of the first applicant for the purposes of the Act.

29. Having considered all of the matters covered in reg 1.15A(3), the Tribunal made the following dispositive findings:

“137. Balancing all of the above findings and considerations the Tribunal is not satisfied that the parties have a mutual commitment to a shared life as a married couple to the exclusion of all others for the purpose of S.5F(b).

138. Further, balancing all of the above findings and considerations the Tribunal is not satisfied that the relationship between the parties is genuine and continuing for the purposes of S.5F(c).

139. The Tribunal finds that the parties do not, at the time of decision, live together for the purposes of S.5F(d)(i).

140. The Tribunal is not satisfied that the parties do not live separately and apart on a permanent basis for the purposes of S.5F(d)(ii).

141. Given these findings the Tribunal is not satisfied that the requirements of S.5F(2) are met at the time of this decision. Therefore the applicant does not meet cl.801.221(2)(c).”

30. The key expression in the above is “*balancing all of the above findings and considerations*”. The Tribunal did not attempt to apportion in a measurable way the weight it gave to individual matters which it accepted or rejected. It engaged in what has been described as an evaluative and inevitably impressionistic task of determining whether the applicants had established that the sponsor was the spouse of the first applicant in light of the definition in s 5F.

Ground one

31. The Tribunal commenced its consideration by correctly identifying the relevant issue as being whether the first applicant was the spouse of the sponsor for the purposes of cl 801.221(2)(c) and noting the definition of spouse in s 5F of the Act. It concluded the parties were validly married and went on to consider the other requirements. The Tribunal’s consideration of the prescribed matters in reg 1.15A(3) was preceded by a detailed summary of the evidence before it.⁹

⁹ CB 561-566 [12]-[81].

32. Since *He v Minister for Immigration and Border Protection* it is settled that the requirement for the Tribunal to consider all of the circumstances in reg 1.15A(3) means that it must make findings in relation to all of the matters prescribed. The Tribunal member specifically referred to this authority and took note of that requirement.¹⁰ The decision record shows that he proceeded to make findings with respect to all of the prescribed matters. When considering reg 1.15A(3)(a)(iii) and the question of pooling of financial resources the Tribunal said as follows:

“96. *At the time of this decision the parties occasionally provide each other with small amounts of cash when needed but that this is not regular.*

97. *The applicant gave evidence that the parties occasionally provide each other with small amounts of cash when needed but that this is not regular.*

98. *The parties say they do not have any major financial commitments.*

99. *The Tribunal finds that there is very limited pooling of financial resources at the time of this decision but that this is not surprising given that they are living in different countries, and accords this consideration little weight.”*

33. It is apparent from the above that the Tribunal member considered the opportunity for the parties to pool resources, given the first applicant was living in Thailand, the extent to which they gave each other direct financial support and their lack of major commitments. The conclusion that there was very limited pooling of financial resources at the time of the decision does not in my opinion equate to a finding that there was no evidence of substance of financial pooling as contended by the applicants. The Tribunal appears to have accepted that there was some financial pooling. One way of considering whether the reasoning of the Tribunal failed to take into account the evidence of the contribution by the sponsor is to question whether the conclusion reached of itself suggests a failure to have regard to that pertinent matter. When considering the evidence as a whole, even taking the contribution of the sponsor towards the business venture, the finding of limited pooling would seem to have been open to it. I am not satisfied that the failure

¹⁰ CB 561 [10].

of the Tribunal member to specifically mention the \$10,000 in the course of making that finding meant that he did not have regard to it for that purpose. The finding made could just as easily be read as saying that ‘on the evidence before the Tribunal’ there was very limited pooling of financial resources, without expanding or changing the intent of the finding. The traversal of the evidence which preceded the findings with respect to the specific reg 1.15A(3) matters was not written in a vacuum. As the heading in the decision record illustrates,¹¹ it represented the point in the reasons at which it is clear that the Tribunal member was commencing his consideration of whether the applicant met the requirements of s 5F(2)(b), (c) and (d). By that stage he had already acknowledged that it was necessary to make findings on each of the prescribed matters in reg 1.15A(3). The Tribunal referred to the applicants’ understanding of the legal status of the sponsor with respect to the company which had been registered to “*run the business*”, the sponsor’s lack of direct involvement in the various restaurant businesses and the financial contribution she had made towards it in several passages.¹² The question is whether what the Tribunal did was sufficient to amount to a ‘consideration’ of the matter as understood from the relevant authorities.

34. In order for a Tribunal to bring an active intellectual engagement to the circumstances of the relationship and give them proper, genuine and realistic consideration, it is necessary to identify the relevant circumstances of the relationship.¹³ I am satisfied that the Tribunal did identify the relevant circumstances of the relationship. The decision of *Li* draws a distinction between noting the evidence and making a finding on it.¹⁴ After making a number of references to the financial contribution made by the applicant to the restaurant business, the Tribunal member referred to that evidence when considering the financial aspects of the relationship, specifically joint ownership of major assets.¹⁵ The finding that the restaurant business did not amount to a ‘major asset’ for the purposes of the application suggests that the Tribunal did accept the evidence of that financial contribution. It did not reject the evidence of the contribution. That it did not appear to

¹¹ CB 561.

¹² CB 564 [57], 565 [74]-[75], 566 [85], [92].

¹³ *Huai Xin Li v Minister for Immigration and Citizenship* (2008) 102 ALD 354 [27].

¹⁴ *Ibid* [24].

¹⁵ CB 566 [85]-[86].

doubt the sponsor having an interest in the restaurant business is apparent from the finding it made with respect to joint liabilities when it concluded that the nature of the sponsor's interest in the business was “*not clear*”.¹⁶ Consistent with the finding above, it did not reject that she had an interest in it. The applicants accepted that the Tribunal did take that matter into account, at least for the purpose of reg 1.15A(3)(a) (i)¹⁷. I am not satisfied that the applicants have demonstrated that the Tribunal failed to have regard to the evidence of the \$10,000 contribution made by the sponsor in reaching the conclusion that there was very limited pooling of financial resources. In my view, to conclude otherwise would be to ignore the stricture in *Wu Shan Liang* that a Tribunal's reasons are not to be read with an eye keenly attuned to the perception of error.¹⁸ As observed by Charlesworth J in *Singh*, the impressionistic and evaluative nature of the Tribunal's task must be taken into account when drawing implications from its reasons.¹⁹ As submitted by the first respondent, it would be an artificial reading of the Tribunal reasons to conclude as the applicants contend, that it took account of the \$10,000 for one of the reg 1.15A(3)(a) matters and not another.

Ground Two

35. I do not accept the submission that the Tribunal must have misconceived the meaning of the term “*pooling of financial resources*”. I note that the applicants contend that it is not necessary for the purposes of this ground for me to conclude that the Tribunal failed to have any regard to the \$10,000 contribution by the sponsor. That submission placed weight on the asserted purpose of the contribution, being to secure the couple's joint future. In that sense it could be properly seen to be the placing of a resource into a common stock, or a combination of resources for their common benefit. In the circumstances of this relationship it was submitted that this was a very significant matter. In that regard, as I understand the submission, it was not so much the amount of the contribution but the source of it and the intention behind it which were significant. The difficulty with that submission is that the Tribunal, being aware of the sponsor's contribution and that it had been drawn from the sponsor's

¹⁶ CB 566 [92].

¹⁷ Applicants' written submissions, [38].

¹⁸ *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259.

¹⁹ *Singh v Minister for Immigration and Border Protection* (2017) 159 ALD 442 [20].

superannuation fund, did not appear to accept that the common purpose existed. Whilst the various questions posed by the matters referred to in Roman numerals in the subparagraphs below r 1.15A(3)(a) are separate considerations which must be distinctly addressed, there is in this case a degree of overlap in the evidence relevant to answering each of them. The anterior finding that the Tribunal did not accept that the parties held a common intention that the sponsor would move to South Australia if the restaurants were successful enough²⁰ as demonstrated by the sponsor's failure to have done so, was relevant both to the question of the nature of the parties commitment to each other and the common purpose for which the applicants contend. I have already found above that I am not satisfied that it has been demonstrated that the Tribunal failed to have regard to the \$10,000 contribution for the purpose of considering reg 1.15A(3)(a)(iii). The effect of the Tribunal's findings is that it did not accept that the restaurant business was for their common benefit and implicit in that is a rejection of the contention that they had plans for a joint future. This ground may have had more traction if the Tribunal had found that there was no evidence of pooling of financial resources or that there was no evidence of substance that there had been a pooling of financial resources. At the risk of being repetitious, the finding was that there was very limited financial pooling. It is not possible to infer that the Tribunal misconceived the meaning or ambit of that term.

Ground three

36. It is clear from reg 1.15A(2) that the matters in sub-reg (3) are not an exhaustive list.
37. Regulation 1.15A(2) requires the Minister to "... *consider all of the circumstances of the relationship, including the matters set out in subregulation (3)*". The applicants are correct to submit that the Tribunal was required to consider their contention that the restaurant was to provide for their joint future. That was a matter which is capable of being seen as a "*circumstance of the relationship*". Namely, there was a restaurant business, the sponsor made a financial contribution towards it from her superannuation, they both claimed that they were in an ongoing relationship and that there was an agreement for the sponsor to travel to South Australia if the business was

²⁰ CB 564 [60].

successful enough. All of those matters were considered in the context of the various matters set out in reg 1.15A(3)(a). They were “*circumstances of the relationship*”, but in the manner in which the Tribunal approached the evidence, not additional circumstances which were not otherwise covered by reg 1.15A(3)(a). I reject the submission that the Tribunal did not consider or somehow simply missed the point that the restaurant business was asserted to be a central plank in the plans the couple had for a joint future together. In the context of their evidence, what other purpose could it have possibly served? It was not necessary for the Tribunal to adopt the words ‘joint future’ simply because that was a phrase used by the first applicant in a statutory declaration. The failure to do so does not of itself demonstrate a failure to apprehend the contention made or to consider the issue in an active intellectual process. Nor am I satisfied that the failure to specifically mention that by reason of a trust deed the first applicant and the sponsor were joint beneficiaries and principles of that trust demonstrates a failure to consider the business arrangements when considering the matters in reg 1.15A(3)(a). It was clearly aware of the trust because it referred to it.²¹ It also made reference, without apparently doubting the veracity of the claim, that the sponsor understood that her name was “*on the papers and she is a co-owner of the restaurant*”.²²

38. I am not satisfied that it has been demonstrated that the Tribunal failed to consider all of the circumstances of the relationship by virtue of a failure to consider the significance of the restaurant business and the sponsor’s contribution towards it in the context of their asserted joint future together. To the contrary, I am of the view that a fair reading of the decision suggests that the significance of those matters was central to its consideration of the factors set out in reg 1.15A(3)(a).
39. I dismiss ground three.
40. In the circumstances it is not necessary for me to consider the competing submissions of the parties as to materiality.
41. I make the orders to be found at the beginning of these reasons.

I certify that the preceding forty-one (41) paragraphs are a true copy of the reasons for judgment of Judge Heffernan

²¹ CB 566 [92].

²² CB 566 [81].

Associate:

Date: 4 December 2020